

**BEFORE THE NEBRASKA TAX EQUALIZATION  
AND REVIEW COMMISSION**

PARK-OLD MILL LLC,	)	
	)	
Appellant,	)	Case No. 07C-253
	)	
v.	)	DECISION AND ORDER
	)	AFFIRMING THE DECISION OF
DOUGLAS COUNTY BOARD OF	)	THE DOUGLAS COUNTY BOARD OF
EQUALIZATION,	)	EQUALIZATION
	)	
Appellee.	)	

The above-captioned case was called for a hearing on the merits of an appeal by Park-Old Mill LLC ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on August 22, 2008, pursuant to an Order for Hearing and Notice of Hearing issued June 19, 2008. Commissioners Warnes, Salmon and Hotz were present. Commissioner Warnes was the presiding hearing officer. Commissioner Wickersham was excused from participation by the presiding hearing officer. The appeal was heard by a quorum of a panel of the Commission.

John F. Lund, Managing Member of Park-Old Mill LLC, was present at the hearing without legal counsel.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

## **I. ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2007.

## **II. FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: MIRACLE HILLS PARK LOT 18 BLOCK 0 IRREG, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$792,000.00	Included in Total	\$792,000.00
Improvement	\$8,629,000.00	Included in Total	\$8,629,000.00
Total	\$9,421,000.00	\$8,620,642.00	\$9,421,000.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on June 19, 2008, set a hearing of the appeal for August 22, 2008, at 9:00 a.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value	\$792,000.00
Improvement value	<u>\$8,629,000.00</u>
Total value	<u>\$9,421,000.00.</u>

**III.  
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Supp. 2007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 ( 2002).

5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
9. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
10. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

11. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
12. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
13. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
14. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
15. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions

governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
19. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
20. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
21. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
22. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).

23. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
25. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

#### **IV. ANALYSIS**

The subject property is an improved commercial parcel located on 3.03 acres of land. (E1:6). The improvement is a five-story office building built in 1986. (E1:21 & E1:22).

The Taxpayer testified that he puts into dispute the assessed valuation of the subject property and that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The Taxpayer did not dispute the assessed valuation of the land of the subject property at \$792,00.



One issue presented by the Taxpayer and the County is the assessed square footage of the subject property. The County's property record card lists the improvement on the subject property as having 95,112 square feet. (E1:21). Testimony by the Taxpayer's financial manager put the square footage of the subject property at 70,661 for the "rentable square footage." His lower square footage represented the "rentable" square footage of the subject property and removed the vertical intrusions such as stairs or the penthouses on the 5th floor.

The dispute about square footage is not at issue since both parties utilized the income approach in calculating the actual value of the subject property for 2007 and both used 70,661 square feet for their calculations, the Taxpayer's Exhibit 1 page five and the County's Exhibit 3 page one. Using the rentable square footage of the subject property conforms to the professional standard of calculating the potential gross income for a rented commercial property when using the income valuation approach. "The income to various lease interests is generally derived through the conveyance and operation of leases." *The Appraisal of Real Estate*, 12th Edition, 2001, The Appraisal Institute, p. 476.

## **VALUATION**

### **TAXPAYER**

Both the Taxpayer and his financial manager testified that the subject property was purchased by the Taxpayer on August 22, 2006 for \$9,500,000. They each testified that the purchase was a Section 1031 Exchange and that the purchase price was not the actual value of the subject property since the sale was not advertised nor placed on the open market. They both testified that monies in excess of the actual value of the subject property were paid in order to assure a timely and legal exchange of properties. The Commission does not find that the sale

price of the subject property is by itself conclusive evidence of actual value. “It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value.” *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998).

The Taxpayer’s financial manager testified that he had a minority interest in the ownership of the subject property and it is with this qualification that he had an opinion of the actual value of the subject property on January 1, 2007. His opinion of value as a part owner was \$8,587,946. His opinion was based on the income approach to valuation using the 2006 Net Operating Income (NOI) and a capitalization rate of 9%. He used a zero vacancy rate. The NOI for the subject property for 2006 is \$775,033 and can be found at Exhibit 1 pages twelve and thirteen which itemizes both the income and expenses for one year, 2006. The expenses for 2006 for the subject property are shown on Exhibit 1 page twelve and include the cost for real estate taxes. The valuation of the subject property using a NOI of \$775,033 and a capitalization rate of 9% (unloaded, in other words, without the addition of the effective tax rate) is \$8,611,478 ( \$775,033 divided by .09 ). The Taxpayer’s worksheet for the above income approach to valuation is shown on Exhibit 3 page one and states that the 2007 actual value is \$8,587,946.

The Taxpayer’s financial manager testified that his suggested capitalization rate was not supported other than by his “feeling” that it was an appropriate rate to use.

The Taxpayer testified also and stated he had been a licensed Nebraska appraiser for 10 years of this 35 years of work in the real estate market. He was not currently credentialed at the time of his testimony. He opined that his opinion of actual value on January 1, 2007 as an owner was also \$8,587,946 using the income approach to valuation shown on Exhibit 3 page one.

### COUNTY

The County did not provide testimonial evidence for its valuation is evidenced by Exhibit 10. The County's Exhibit 10 pages one to twenty six uses both a cost and income approach to valuation of the subject property. The opinion of final value is \$9,421,000, which is derived from the income approach, as shown on Exhibit 10 page twenty six. The County's worksheet for the income approach is on Exhibit 10 page twenty four. The County uses a capitalization rate of 8.5%, which is unloaded, meaning that it does not include the Effective Tax Rate (ETR).

The following table summarizes the income approach to valuation used by both parties.

	Taxpayer (E3:1)	County (E10:24)
Gross Income	\$1,428,350	\$1,324,706
Vacancy & Collection Loss	0	7%
Expenses	\$653,316	\$431,191
Net Operating Income	\$772,915	\$800,785
Cap Rate	9%	8.5%
Actual Value	\$8,587,946	\$9,421,000

The Commission notes that a deficiency with the evidence by the Taxpayer is that the Commission has only one year of actual income and expenses for the subject property and is unable to confirm a stabilized net operating income or expenses. The income approach to

valuation requires a stabilization of the variable income and expense pattern. *Income Property Valuation*, Jeffrey D. Fisher and Robert S. Martin, Dearborn Financial Publishing, Inc., 1994, p. 170. It is then necessary to compare the stabilized income and expenses to the market rents and expenses. “Market rent is the rental income a property would probably command in the open market. It is indicated by the current rents that are either paid or asked for comparable space with the same division of expenses as of the date of the appraisal.” *The Appraisal of Real Estate*, 12th Edition, 2001, The Appraisal Institute, p. 476. The Taxpayer did not provide evidence of market rent or expenses for comparable parcels.

### **EQUALIZATION**

The Taxpayer provided two parcels that were alleged to be comparable to the subject property in support of his claim that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of these two properties. These parcels are listed by the Taxpayer on Exhibit 1 page five. Parcel #1 is shown on Exhibit 1 page eight. Parcel #2 is shown on Exhibit 1 page 10. The Commission’s review of alleged comparable parcel #1, Exhibit 1 page eight and also shown at Exhibit 10 page 14, is that it sold on September 15, 2006 for \$11,950,000. It was assessed in 2007 at \$11,199,100. The Commission notes that the quality of the subject property is good, Exhibit 1:7, while the quality of this alleged comparable #1 is average. The Commission takes note of this distinction in quality which is an important element in making comparisons between parcels. “The quality and condition of building components greatly influence the cost estimate, the depreciation estimate, the ability of the property to produce rental income, and the property’s comparability with other properties.” *Id.*, at page 264-265.

Alleged comparable parcel #2 is found on Exhibit 1 page eleven while the subject property is shown on Exhibit 1 page seven. From the exhibits, the Commission notes that the subject property is listed as having 91,723 square feet and this alleged parcel is listed as having 77,325 square feet. There was no evidence provided of the income or expenses for either parcel alleged to be comparable in order for the commission to make a comparison.

The Taxpayer and his financial manager both testified as to differences between the subject property and the alleged comparable parcels that related to location, but the Commission finds that this evidence is not sufficient to allow relief.

The Commission finds that there was not competent evidence that the alleged comparable parcels were in fact comparable. From the evidence provided by the Taxpayer the Commission finds that the alleged comparable properties are not comparable for purposes of the Taxpayer making a successful equalization analysis.

The Commission finds that the Taxpayer has not rebutted the presumption that the County Board of Equalization faithfully performed its duties and had sufficient competent evidence for its decision both as to its decision as to valuation and equalization. Despite this fact, the Commission has reviewed all of the evidence presented and further finds that the Taxpayer has not shown by clear and convincing evidence that the County Board's decision was either arbitrary or unreasonable nor has he shown by the reasonableness of the evidence a new valuation or that the subject property was not equalized with the taxable value of other real property. The appeal of the Taxpayer is denied.

**V.  
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear, and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value of the subject property for the tax year 2007 is:

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Land value	\$792,000.00
Improvement value	<u>\$8,629,000.00</u>
Total value	<u><u>\$9,421,000.00.</u></u>

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on December 4, 2008.

Signed and Sealed. December 4, 2008.

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Robert W. Hotz, Commissioner

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William C. Warnes, Commissioner

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Nancy J. Salmon, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**